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No. 95-5661

Supreme Court, U. S.

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In The
Supreme Court of the United States

October Term, 1995

JUAN MELENDEZ,

Petitioner,

vs.

UNITED STATES,

Respondent.

◆
**On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**
◆

PETITIONER'S BRIEF ON THE MERITS
◆

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QUESTION PRESENTED

Once the prosecutor moves for a sentencing departure in recognition of a defendant's substantial assistance to law enforcement, does a federal court have authority to impose a sentence beneath both the guideline range and a minimum term set by statute, even when the government does not seek the latter degree of departure?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Juan Melendez and the United States). Edwin Moya, Raphael Ferrera, Bienvenido Polanco and Ana Mercedes Ferrera were co-defendants in the District Court, but were not parties to the appeal or in this Court.

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OPINIONS BELOW

The Third Circuit's Opinion (J.A. 22-38) (per Stapleton, J. with Cowan, J.; Huyett, U.S.D.J., dissenting) and the Court's accompanying Judgment (J.A. 34) were filed on May 22, 1995. The Opinion is published as *United States v. Melendez*, 55 F.3d 130 (1995). There is no published opinion of the District Court. The Judgment of the District Court (H. Lee Sarokin, U.S.D.J.) imposing sentencing was dated as to petitioner, Juan Melendez, on November 29, 1993 (J.A. 15-21).

JURISDICTION

The Judgment of the United States Court of Appeals for the Third Circuit was entered on May 22, 1995. A Petition for Rehearing with Suggestion for Rehearing En Banc was denied on June 27, 1995 (J.A. 40-41). The Petition was filed on August 16, 1995. See S.Ct. Rules 13.1. Certiorari was granted on November 6, 1995 (J.A. 42). This Court's jurisdiction rests upon 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

Due to their number and length, the statutes and regulations involved (18 U.S.C. §3553(e), 28 U.S.C. §994(n) and U.S.S.G. §5K1.1 (p.s.) and relevant commentary are reproduced in the Appendix to this Brief (App. 1-7).

STATEMENT OF THE CASE

This case presents sentencing issues arising out of the petitioner's conviction for conspiracy to distribute cocaine.

A. Statement of Facts

Petitioner and Edwin Moya were approached by confidential informants of the United States Customs Service posing as drug dealers. After two months of abortive discussions, they arranged the purchase of at least 25 kilograms of cocaine in North Bergen, New Jersey. They gave a \$10,000.00 deposit on November 14, 1992, with an additional \$2,500.00 paid the next day. Four days later, petitioner and Edwin Moya were arrested and incarcerated on separate New York State drug charges.

Afterwards, co-defendants Ana Mercedes Ferrera, Raphael Ferrera and Bienvenido Polanco negotiated three separate cocaine transactions with Customs agents, each deal encompassing 75 kilograms of cocaine. After Raphael Ferrera and Bienvenido Polanco picked up the first shipment of drugs on December 15, 1992, they were arrested. Ana Mercedes Ferrera was arrested the following day.

B. Procedural History

On December 18, 1992, a federal grand jury sitting in the District of New Jersey indicted the petitioner and co-defendants Moya, the Ferreras and Polanco. Petitioner was named in Count One which charged a conspiracy, in violation of 21 U.S.C. §846 to distribute in excess of five

kilograms of cocaine, punishable under *Id.*, Section 841(a)(1)(a)(ii). Petitioner was not named in the second and final Count.

On May 10, 1993, petitioner entered into a plea agreement with the government (J.A. 4-12). The agreement provided that, in return for petitioner's substantial assistance, the government "will move before the sentencing court, pursuant to U.S.S.G. §5K1.1 (p.s.), to depart from the otherwise applicable Guideline range" (J.A. 9). The agreement, drafted by the government, failed to provide notice that the government would oppose departure below the ten-year mandatory minimum penalty otherwise required in Count One.

On October 7, 1993, the government moved under §5K1.1 and the "written plea agreement dated May 10, 1993" for a "sentence lower than what the court had determined to be otherwise applicable under the Sentencing Guidelines" (J.A. 13-14). The government did not advise the court that it would oppose a departure under the ten-year mandatory minimum. Nor did the government articulate in its §5K1.1 motion its legal position that a separate motion for departure below the mandatory minimum was required under §3553(e).

The probation department prepared a pre-sentence investigative report dated July 26, 1993. The probation department calculated petitioner's guideline range for imprisonment between 135 and 168 months. The report further noted that a ten-year mandatory minimum was applicable under 21 U.S.C. §841(b).

At the November 23, 1993 sentencing hearing, the government argued for the first time, that "absent a

motion under §3553(e)," petitioner's sentence could not be less than ten years. The government insisted that the district court was powerless to depart below the ten-year mandatory minimum on its own initiative. The district court agreed with the government and sentenced petitioner to 120 months' incarceration.

Petitioner appealed the district court's ruling. A Third Circuit panel affirmed. *United States v. Melendez*, 55 F.3d 130 (1995). The majority ruled that a second, separate government motion is necessary for departures below mandatory minimums under §3553(e). The panel found that the United States Sentencing Commission was granted authorization under 28 U.S.C. §994(n) to devise a mechanism for departures from the Guidelines and below mandatory minimums for defendants rendering substantial assistance. The panel found, however, that the Commission declined to follow Congress' directive in §994(n) by limiting these departures down to, but not below, mandatory minimums. Instead, the panel ruled that §3553(e)'s motion requirement was left unaffected and that a second government application for departure below mandatory minimums is necessary. This decision accorded with that of the Eighth Circuit but diverged from the Second, Fourth, Fifth and Seventh.¹

¹ The decision below accords with the Eighth Circuit decision in *United States v. Rodriguez-Morales*, 958 F.2d 1141 (CA8), cert. denied, 113 S.Ct. 375 (1992), but diverges from *United States v. Ah-Kai*, 951 F.2d 490 (CA2, 1991); *United States v. Wade*, 995 F.2d 169 (CA4 1992); *United States v. Beckett*, 996 F.2d (CA5, 1993); *United States v. Wills*, 35 F.3d (CA7, 1994) and *United States v. Keene*, 933 F.2d 711 (CA9, 1991).

On November 6, 1995, this Court granted the petitioner's Petition for Certiorari. Petitioner remains incarcerated pending appeal and review by this Court.

SUMMARY OF THE ARGUMENT

(a) In the Sentencing Reform Act of 1984, Congress has decided that defendants who provide substantial assistance in the investigation or prosecution of another individual should be rewarded with lower sentences. Congress has further determined that possible rewards for substantial assistance should include sentencing reductions below statutory minimum penalties.

(i) Congress established a unitary statutory scheme for all substantial assistance departures. Under this system, the government first initiates the process by motion. Then the court, guided by the Commission's written policies, determines the extent of the departure. Under these provisions, the court is granted authority to depart from both a guideline range and a mandatory minimum. Furthermore, once the prosecutor acknowledges that substantial assistance has occurred, the sentencing court has the authority to depart below a statutory minimum if it deems appropriate. Correspondingly, the applicable statutory provisions do not give the prosecutor the power to prevent the court's departure from a statutory minimum simply by declining to cite the enabling statutes. Such an interpretation of the statutory framework would be an evaluation of form over the substance of the statutory language and the congressional

intent to establish a unitary system for substantial assistance departures.

(ii) The two statutes which authorize departures below mandatory minimums for defendants providing substantial assistance. 18 U.S.C. §3553(e) and 28 U.S.C. §994(n). Section 3553(e) provides that "upon motion of the government" the sentencing court is authorized to depart below mandatory minimums when a defendant renders substantial assistance. Section 3553(e) requires, however, that "such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994(n) of title 28, United States Code." Section 3553(e), then, directs that reductions below mandatory minimums be governed by Commission guidelines and policy statements established pursuant to §994(n). Section 994(n), in turn, directs the Commission, in the guidelines and policy statements, to permit lower sentences for defendants who provide substantial assistance "including a sentence that is lower than that established by a statute as a minimum sentence."

(b) The Commission's response to the Congressional mandate in §994(n) is found in U.S.S.G. §5K1.1. Through this policy statement, the Commission created a mechanism for departures from the Guidelines and below mandatory minimums. Incorporating the procedure set forth in §3553(e), the Commission has required that a government motion be brought before the sentencing court can depart from the Guidelines and below mandatory minimums. Thus, the Commission implemented the mandate for a unitary scheme for departures for substantial assistance that requires but a single government

motion to trigger the authority of the sentencing court to depart not only below the Guideline range, but also below any statutory minimum.

(i) The Court has held the guideline commentary is binding if consistent with congressional intent and not a plainly erroneous reading of the guideline. In this case, the three Application Notes to §5K1.1 all support the proposition that the Commission intended §5K1.1 to apply to departures below mandatory minimums. In addition, the commentary to U.S.S.G. §2D1.1 provides further support for the establishment of a guideline mechanism for departures below mandatory minimums under §5K1.1. As Application Note 7 to §2D1.1 states, mandatory minimums may be "waived and a lower sentence imposed under § 5K1.1 where a defendant renders substantial assistance".

(ii) In the lower court, the majority opinion of a three-judge panel found that the Commission, ignoring Congress' mandate in §994(n), limited the authority of §5K1.1 to departures from a guideline range. The panel found that a second, separate government motion must be brought under §3553(e), else the sentencing court is barred from departing below a statutory minimum term. In reaching this result, the panel misread the language and purpose of relevant Commission policy statement and commentary. Therefore, the Third Circuit opinion in *Melendez* should be reversed.

(iii) The unitary scheme for a single motion is consistent with the intent of the sentencing Reform Act of 1984. Unlike the Third Circuit dual motion approach, the unitary scheme assures congressional goal of uniformity

and fairness in sentencing by permitting appellate review of district court sentencing determinations in substantial assistance cases. 18 U.S.C. §3742(a)(2). In addition, a balanced relationship in substantial assistance cases between prosecutor and court is maintained. The government is given the critical role of triggering the substantial assistance process by notifying the court by motion that substantial assistance has been rendered by the defendant. The court then has authority to determine the appropriate sentence, including the granting of departure below the guideline range or a statutory minimum term.

ARGUMENT

I. A SINGLE GOVERNMENT MOTION ACKNOWLEDGING THE DEFENDANT'S "SUBSTANTIAL ASSISTANCE" AUTHORIZES A COURT TO DEPART NOT ONLY BELOW THE GUIDELINE RANGE, BUT ALSO BELOW ANY MINIMUM TERM SET BY STATUTE.

By the Sentencing Reform Act of 1984, Congress created the United States Sentencing Commission and charged it with the creation of guidelines and policy statements for courts to use in imposing sentences in all federal criminal cases. Congress also maintained and subsequently expanded a limited number of criminal statutes which contain mandatory minimum penalties. These mandatory minimum penalties generally exist independently of, and indeed, may take precedence over a sentence under the Guidelines.

However, in the Sentencing Reform Act, Congress established one exception to this dual scheme of guideline and mandatory minimum sentences – the "substantial assistance" case. See *Wade v. United States*, 504 U.S. 181, 118 L.Ed.2d 524, 112 S.Ct. 1890 (1992). In this area, Congress enacted two tightly interrelated provisions, 18 U.S.C. §3553(e) and 28 U.S.C. §994(n), which together created a unitary system for permitting sentences lower than both mandatory minimums and guideline derived sentences when a defendant has provided "substantial assistance" to the government in the investigation or prosecution of another person. Under the statutory framework, the prosecutor is given the triggering authority to state whether the cooperation provided by the defendant has amounted to "substantial assistance". However, once that threshold has been crossed, 18 U.S.C. §3553(e) authorizes the court to grant any such departure. Section 994(n) of title 28 has a complementary role. This provision directs the Commission to implement this unitary system for departures, including departures below statutory minimums, through its guidelines and policy statements. Therefore, under this arrangement, once the government notifies the court under U.S.S.G. §5K1.1, the Commission's applicable policy statement, that a defendant has provided substantial assistance, the government's role reverts to an advisory, albeit an important advisory function.² It is then within the province of the sentencing court, consistent with the policy statements of

² See U.S.S.G. §5K1.1, Application Note 3 (requiring the court to give "substantial weight to the government's evaluation of the assistance rendered").

the Commission, to determine the sentence, taking into account the nature and extent of the substantial assistance and all other appropriate sentencing factors.

A. The Applicable Statutes Establish a Unitary Framework for Government Motions and District Court Departures for Substantial Assistance.

The terms of §3553(e) and §994(n) show that a prosecutor's "substantial assistance" motion cannot be framed as to restrict the court to a sentencing decision at or above the level set by a mandatory minimum statute. Interpretation of a congressional enactment begins with the statutory language. *Bailey v. United States*, ___ S.Ct. ___ (1995), slip op. at 6, citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989). If not defined by the statute itself, specific words that have no accepted common law meaning among jurists should be given their ordinary or natural meanings. *Smith v. United States*, 113 S. Ct. 2050, 2053 (1993). However, the Court considers not only the "bare meaning of the word but also its placement and purpose in the statutory scheme." *Bailey, supra*, ___ U.S. ___ (1995), slip op at 6, citing *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). This Court begins with presumptions that Congress intended that each term have some meaning and that no terms be treated as mere surplusage whenever possible. *Bailey, supra*, quoting *Ratzlaf v. United States*, 510 U.S. ___ (1994) (slip op. at 5-6). Application of these basic precepts of statutory construction to the tightly interrelated sections of 18 U.S.C.

§3553(e) and 28 U.S.C. §994(n) demonstrates that Congress intended to establish a unitary framework for government motions and district court departures in substantial assistance cases.

1. Pursuant to the Unitary Departure Scheme for Substantial Assistance Cases, §3553(e) Establishes that Departures from both a Guideline Range and a Statutory Minimum be Governed by the Procedures Established by the Commission Pursuant to §994(n).

Section 3553(e) contains two grants of authority. First, it grants to the government the exclusive power to initiate a departure for substantial assistance.³ See *Wade, supra*. However, this is the only role given to the government. 18 U.S.C. §3553(e) states:

Upon motion of the government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. *Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.*

(emphasis added)

³ This element of 3553(e) does not bear on the question presented by this case. Furthermore, because the Commission tracked this exact statutory language in §5K1.1, (p.s.) there is no conflict between the statute and the guideline on this issue either. See also Part II(A), *infra*.

Nothing in the plain language of §3553(e) suggests that once the prosecutor has triggered the process by making a motion that substantial assistance has occurred, it otherwise can restrict the court's exercise of its authority to depart below a mandatory minimum.

Concomitantly, therefore, once the government motion is made, §3553(e) grants the district court the authority to sentence defendants below a statutory minimum. *Wade, supra*, 504 U.S., at 182. ("Section 3553(e) empowers district court . . . to impose a sentence below the statutory minimum . . ."). However, §3553(e) does not stop there. It directs that its executive and judicial authority be exercised "in accordance with the guidelines and policy statements" of the Commission established pursuant to §994(n). By its terms, §3553(e) requires that both the government and the district court look to the Commission's actions to exercise their respective roles properly in substantial assistance departures cases. Thus, it is clear from §3553(e) alone, that Congress intended a unitary scheme for substantial assistance departures in which the government and the courts operate in conjunction with the Commission for all substantial assistance departures, including those below a mandatory minimum.

2. As Part of the Unitary Substantial Assistance Departure Scheme, §994(n) Grants the Commission the Authority to Establish Guidelines and Policies for Substantial Assistance Departures Below Both a Guideline Range and Statutory Minimums.

Just as §3553(e) cross-references the Commission's powers under 28 U.S.C. §994(n), so too does the text of

§994(n) explicitly relate to the subject matter of §3553(e) – departures below a mandatory minimum based upon substantial assistance.

28 U.S.C. §994(n) states:

The Commission shall assure that *the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by a statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.*

(emphasis added)

The text of §994(n) authorizes the Commission to accomplish two goals. First, this section requires the Guidelines to reflect lower sentences for substantial assistance. Such a directive is similar to other directives in the Commission's overall mandate to create guidelines that are consistent with certain policy objectives.⁴ Second, §994(n) directs the Commission to establish guidelines and policy statements that call for departures below mandatory minimums in substantial assistance cases. Such a directive is extraordinarily significant in this statutory scheme. When originally enacted, §994(n) was the only provision in the Sentencing Reform Act that granted the

⁴ See 28 U.S.C. §994(h) (guidelines must be at or near the maximum for defendants with specified prior felony record); 28 U.S.C. §994(j) (the guidelines should reflect the appropriateness of a sentence other than imprisonment for many first-time, non-violent offenders).

Commission authority to override a statutory minimum sentence.⁵ In all other contexts, mandatory minimums exist independently, and in fact, trump what would otherwise be the guideline-derived sentence.⁶

This exception to an otherwise parallel system of Guidelines and mandatory minimums clearly indicates Congressional intent that there be a single substantial assistance departure scheme. Furthermore, the grant of authority to disregard statutory minimum terms to the sentencing court and the Commission in their respective roles in the system, clearly indicate that the power to decide the extent of a substantial assistance departure was granted to the sentencing court, as guided by Commission policy, and not to the prosecutor.

⁵ In 1994, Congress added 18 U.S.C. §3553(f), the so-called "safety-valve" exception which permits, in limited circumstances, the imposition of a guideline sentence below a mandatory minimum for non-violent, low-level narcotics offenders. See Section 80001(c) of Pub.L. 103-22. The Commission's application of the safety-valve appears in U.S.S.G. §5C1.2.

⁶ U.S.S.G. §5G1.1(b) provides as follows: "Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required maximum sentence shall be the guideline sentence." U.S.S.G. §5G1.1(c) further provides

In any other case, the sentence may be imposed at any point within the applicable guideline range, provided that the sentence -

- (1) is not greater than the statutorily authorized maximum sentence, and
- (2) is not less than any statutorily required minimum sentence.

3. Specific Terms Within 18 U.S.C. §3553(e) and 28 U.S.C. §994(n) Support the Conclusion that the Commission's Guidelines and Policy Statements Were Intended to Apply to Both Guideline Range and Statutory Minimum Departures.

As noted above, it is uncontrovertible that the tightly interrelated, cross-referenced provisions of §3553(e) and §994(n) must be applied together. Furthermore, each provision contains specific terms further demonstrating that Congress intended a unitary approach to substantial assistance departures in which there should be no distinction between the treatment of departures from a mandatory minimum and from a guideline sentence.

First, both sections contain the same definition of "substantial assistance." The "substantial assistance" must have been rendered "in the investigation or prosecution of another person who has committed an offense." Use of identical standards in these two sections is strong evidence that Congress envisioned a unitary structure for substantial assistance departures in which the government would make the motion, and the court would determine the extent of reward for the defendant's cooperation.

Furthermore, the clause in 18 U.S.C. §3553(e) that cross-references the Commission's responsibilities in substantial assistance departures uses three specific terms that also support petitioner's interpretation of these provisions. Section 3553(e) states that substantial assistance departures below a mandatory minimum such sentences shall be "in accordance" with "the guidelines" and "policy statements" of the Commission. Proper parsing of

Congressional intent requires that each term be examined.

Focusing first on "in accordance," Webster's Dictionary defines "accordance" as "conformity" or "agreement." Webster's II New Riverside University Dictionary, 71 (Houghton Mifflin 1984). The Standard Law Dictionary offers the same. Black's Law Dictionary 17 (6th Ed. Nolan & Nolan-Haley 1990) Thus, departures from mandatory minimums under §3553(e) must be "in conformity" with the substantial assistance departure regime established by the Commission pursuant to §994(n). The use of "in accordance" requires much more than mere consistency with the Commission's broad policies for departures that a two-track motions system would entail. Rather, this language should be read as a directive that, while §3553(e) grants power and specific roles to the executive and judiciary in substantial assistance cases, it is the Commission which is charged by Congress to devise the mechanism for the exercise of each branch's respective authority.

The inclusion in §3553(e) of the term, "the guidelines" is also significant within this statutory framework. Under 28 U.S.C. §994(a)(1), the Commission is empowered to write "guidelines" that are for the "use of a sentencing court in determining the sentence to be imposed in a criminal case." "The guidelines," therefore, apply at the act of sentencing by the district court. Quite separately, the Commission is authorized to issue "general policy statements" concerning the "application of the guidelines or any other aspect of sentencing or sentencing implementation" which further the statutory goals of criminal sentences. 28 U.S.C. §994(n) and 18 U.S.C.

§3553(a)(2). In comparison to "the guidelines," policy statements provide overall guidance, but are not necessarily used by the court in imposing sentence.

Following the import of this distinction, §3553(e)'s requirement that a substantial assistance departure from a mandatory minimum under §3553(e) be "in accordance" with a substantial assistance departure from "the guidelines," means that whatever guidelines or policy statements the Commission deems applicable when the court imposes a guideline sentence, must also be used when the case involves a mandatory minimum statute. Only in this way can the term, "the guidelines" be held to have an independent meaning from "policy statements" in §3553(e).⁷

Several related conclusions should be drawn from this analysis of the statutory framework and specific statutory language. First, by drafting the substantially similar and explicitly cross-referenced sections, §3553(e) and §994(n), Congress clearly indicated its intent to establish a unitary substantial departure scheme. Second, under this scheme, it is the Commission to which is delegated the responsibility to create the mechanism to implement all such departures. Third, there is simply no statutory basis from which to infer that Congress intended to permit the prosecutor to restrict the court's power under §3553(e), once the government indicates that substantial

⁷ A contrary reading of §3553(e), which would merely require some general consistency between departures under the guidelines and mandatory minimums would make the inclusion of the term "the guidelines" in §3553(e) superfluous.

assistance has occurred. On the contrary, such an interpretation, which would allow the government to control the court's power under §3553(e) solely based upon the heading or citations in the motion it filed, would be a gross elevation of form over the clear substance and import of the statutory scheme. As noted by the Seventh Circuit in *United States v. Wills*, 35 F.3d 1192, 1196 (CA7, 1994), "Nothing in these tightly interrelated provisions, §994(n) and §3553(e), contemplates the sort of prosecutorial control of the decision of how much a departure is appropriate that the government's position urges."

Finally, only petitioner's interpretation of this statutory framework allows the Court to give meaning to each term in §3553(e). The subsequent action of the Commission pursuant to 28 U.S.C. §994(n) demonstrates that this analysis of Congressional intent is correct, because the Commission's implementation of these provisions comports with the integrated approach to substantial assistance departures from mandatory minimums and guideline sentences.

II. A MOTION UNDER §5K1.1 IS SUFFICIENT TO TRIGGER THE COURT'S POWER TO DEPART BELOW A MANDATORY MINIMUM UNDER 18 U.S.C. §3553(e) BECAUSE U.S.S.G. 5K1.1 IMPLEMENTS CONGRESS' UNITARY SCHEME FOR SUBSTANTIAL ASSISTANCE CASES.

Section 994(n) of Title 28 directs the Commission to implement through its guidelines and policy statements, a mechanism for courts to grant downward departures in recognition of a defendant's substantial assistance to law enforcement effort, including sentences below mandatory

minimums. The Commission's response was the policy statement appearing at U.S.S.G. §5K1.1.⁸ Through the text and application notes of §5K1.1, as well as in other relevant areas of the Guidelines, the Commission made clear that §5K1.1 was intended to fulfill the Congressional mandate for a single triggering mechanism for substantial assistance departures. Therefore, it follows that the Commission intended that a government motion under U.S.S.G. §5K1.1 be sufficient to trigger a court's full departure power under 18 U.S.C. §3553(e). This position has been adopted by a majority of the lower courts that have considered this issue, including the Second, Fourth, Fifth, Seventh and Ninth Circuits.⁹

⁸ The Commission's decision to designate the substantial departure provision a policy statement is consistent with both the Commission's overall approach to the Guidelines Manual and with petitioner's argument. By definition, guidelines, which are used by the court in imposing sentence, are designed to capture the typical case and attempt to quantify the significant factors in such cases. Departures, on the other hand, are by definition exceptions to the "heartland" case and once found to exist, return substantial discretion to the court in fashioning an appropriate sentence. Hence, the departure provisions in U.S.S.G. §5K are denominated as policy statements. By choosing to consider substantial assistance a departure, the Commission properly designated §5K1.1 a policy statement. This characterization is also consistent with petitioner's basic argument that Congress intended substantial assistance cases to present a unique circumstance, ill-suited to control by rigid parameters such as the government would create with its two-track motion system.

⁹ See *United States v. Ah-Kai*, 951 F.2d 490 (CA2 1991); *United States v. Wade*, 936 F.2d 169 (CA4), affirmed on other ground, 504 U.S. 181 (1992); *United States v. Beckett*, 996 F.2d 70 (CA5 1993);

A. By Tracking the Statutory Language of 18 U.S.C. §3553(e), U.S.S.G. §5K1.1 demonstrates that the Commission Intended to Implement a Unitary System for Mandatory Minimum and Guideline Substantial Assistance Departures.

U.S.S.G. §5K1.1 states in pertinent part

Upon a motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines."

(emphasis added)¹⁰

As previously stated, both 18 U.S.C. §3553(e) and 28 U.S.C. §994(n) use the same definition of substantial assistance; "substantial assistance in the investigation or prosecution of another person who has committed an offense." In §5K1.1, the Commission also adopted this standard for substantial assistance. As noted by Judge Miner for a unanimous panel in *United States v. Ah-Kai*, 951 F.2d 490, 492 (CA2, 1991), "It is noteworthy that

United States v. Wills, supra, United States v. Keene, 933 F.2d 711 (CA9 1991). Cf. *United States v. Rodriguez-Morales*, 958 F.2d 1441 (CA8 1992).

¹⁰ Section 5K1.1 goes on to list a non-exclusive number of factors the court may use in determining the extent of any reduction including: the court's evaluation of the significance of the cooperation (and the government's view of this assistance as well), any testimony given by the defendant, any injury or risk of injury to the defendant or his family resulting from his cooperation and the timeliness of the defendant's assistance. The existence of this list of factors further suggests that it is the court, not the prosecutor, who is to determine the extent of the departure.

§5K1.1 and §3553(e) both require a showing of 'substantial assistance' before there can be any sentencing departure from the guidelines or the statutory minimum." As that court recognized, tracking the statutory language is evidence that "5K1.1 implements the directive of 994(n) and 3553(e), and all three provisions must be read together to determine the appropriateness of a sentence reduction and the extent of any departure." *Ah-Kai, supra*, quoting *United States v. Keene*, 933 F.2d 711, 714-15 (CA9 1990). General principles of administrative law also support this conclusion. Where an agency uses the same statutory language in its rules, it should be presumed to have intended to implement the congressional mandate of that statutory provision without any change of meaning. See generally, *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 31-32 (1981); *Nat'l Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472-477 (1979).

Additional language in the text of §5K1.1 demonstrates that the Commission specifically contemplated and undertook in §5K1.1 to create a conduit for the implementation of §3553(e)'s authorization for the district court to depart below a mandatory minimum for substantial assistance. Section 5K1.1 requires that in all substantial assistance cases, a court may depart only, [u]pon a motion of the government." The inclusion of a government motion requirement in all cases is significant because, while §3553(e) requires a government motion for mandatory minimum departures,¹¹ §994(n) by its terms

¹¹ Petitioner points out that §3553(e) does not require that the motion be made under §3553(e). Rather, as discussed earlier, it requires that such a sentence be imposed "in accordance" with

does not. While §994(n) authorizes the Commission to establish a procedure for lower sentences for substantial assistance (including those below a mandatory minimum), there is no language that a government motion be a condition precedent. In other words, a technical reading of §994(n) would have permitted the Commission to create a guideline or policy statement under which no government motion is necessary to authorize a court to depart downward for substantial assistance, so long as the departure did not breach the statutory minimum.¹² Thus, the ultimate import of this difference in the statutes is that, at most, the Commission could have drafted a policy statement in which a government motion would be required for a departure from the statutory minimum but would not be necessary for a departure from a guideline range.

However, the Commission did not create such a two-tier departure mechanism. Instead, it created a single policy statement which tracks the government motion requirement of §3553(e). By choosing to include the government motion language from §3553(e), the Commission has stated in the clearest terms that it intended to create a unitary scheme, designed to implement substantial assistance departures from both statutory minimums and

the guidelines and support statements of the Commission; supporting the argument that a motion under §5K1.1 triggers the court's power under §3553(e).

¹² Section 994(n), of course, is still subject to the government motion requirement of §3553(e) in mandatory minimum cases.

guideline sentences under the authority of both §3553(e) and §994(n).¹³

B. THE RELEVANT APPLICATION NOTES TO §5K1.1 DEMONSTRATES THE COMMISSION'S INTENT THAT THIS POLICY STATEMENT APPLY TO BOTH MANDATORY MINIMUM AND GUIDELINE SENTENCES.

Section 5K1.1 is followed by three application notes. Each of these notes demonstrates the Commission's understanding that §5K1.1 motions cover both mandatory minimum and guideline departures for substantial assistance. Guideline commentary, including application notes, is included "to help the courts interpret the intent and meaning of the guidelines." *Ah-Kai, supra*, 951 F.2d at 493. See U.S.S.G. §1B1.7. The Court held in *Stinson v.*

¹³ This point was noted but not addressed in *Wade, supra*, because the Petitioner there did "not argue otherwise." *Id.*, 504 U.S. at 185. The comparison of this hypothetical two-tier departure guideline with the actual language of §5K1.1 is a tool for examining the intent of the Commission. Petitioner asserts that the choice to include the government motion language of §3553(e) in §5K1.1 is one further example of the Commission's thorough effort to implement a unitary statutory scheme for substantial assistance departures under which §5K1.1 served as the conduit for departures from both mandatory minimums and guideline sentences. However, Petitioner notes that nothing in this argument necessarily would deny the Commission the authority, if it so chose, to create such a two-tier substantial assistance guideline under which a government motion would be required to depart below a mandatory minimum but no government motion would be required to depart below a guideline range.

United States, 113 S.Ct. 1913, 1918 (1993), that commentary in the Guidelines Manual, "which functions to interpret a guideline or explains how it is to be applied controls." Under *Stinson*, the Commission's interpretation of §5K1.1 is binding, because it is consistent with congressional intent, not violative of the Constitution and not a plainly erroneous reading of §5K1.1 *Id.* at 1919.

1. Application Note 1's Cross-Reference to Judicial and Commission Power to Depart Below a Statutory Minimum Demonstrates that §5K1.1 was Intended to Apply to Mandatory Minimum Cases.

Application Note 1 to U.S.S.G. §5K1.1 states:

Under circumstances set forth in 18 U.S.C. §3553(e) and 28 U.S.C. §994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence.

Application Note 1 explicitly cross-references the application of §5K1.1 to the court's statutory authority to depart below a mandatory minimum, and the Commission's statutory authority under §994(n) to create a mechanism for a departure below a mandatory minimum. Under U.S.S.G. §1B1.7, the first function of commentary is to "interpret the guideline or explain how it is to be applied." Thus, the natural reading of Application Note 1 is that §5K1.1 was intended to be applied to cases that fall under §3553(e) and §994(n), which, of course, include

departures below a mandatory minimum.¹⁴ This is the interpretation given to this note by the majority of federal circuits that have considered the question. For example, the Second Circuit concluded in *Ah-Kai*, *supra*, 951 F.2d at 493, that "[t]he inclusion of this note signifies that §3553(e) was contemplated when §5K1.1 was drafted and leads to the conclusion that the Sentencing Commission intended that §5K1.1 serve as a conduit for the application of §3553(e)." *See also Keene*, *supra*, 933 F.2d at 714; *United States v. Beckett*, 996 F.2d at 72. Reading the text of

¹⁴ The Commission states in §1B1.7 that commentary serves a variety of functions including: interpreting or applying a guideline, setting forth circumstances that may warrant departure, or as background information on the reasons for the promulgation of the guideline. Accordingly, commentary in the Guidelines Manual is divided into "Application Notes" and "Background" and these headings distinguish, for the most part, the intent of the Commission in issuing the particular commentary. Most application notes are the "nuts and bolts" of the commentary which are intended to be applied in individual cases. Most "Background" tends to more general, policy oriented and is used to provide the rationale behind the guideline. Compare U.S.S.G. §4B1.3, Application Notes 1-2 (define terms within U.S.S.G. §4B1.3), Background (explains purpose of §4B1.3). *See also* Application Notes and Background in U.S.S.G. §1B1.9, §5C1.2, §5F1.2.

In this context, it is significant that the Commission chose to place its commentary on the relationship between §3553(e) and §5K1.1 in an application note. By using an application note, the Commission signaled that the information therein is to "be applied" to cases falling under §5K1.1. If the Commission had simply intended to note the existence of a separate section of the U.S. Code that applied to a distinct and unrelated set of substantial assistance cases, it would have been more appropriate to have included a reference to §3553(e) and §994(n) in the "Background" portion of the Commentary to §5K1.1.

§5K1.1, together with Application Note 1, demonstrates that the Commission properly implemented its mandate in §994(n) to draft a policy statement to cover substantial assistance departures from mandatory minimums.

2. Application Notes 2 and 3 to §5K1.1 Also Suggest that §5K1.1 Was Intended to Apply to Mandatory Minimum Departures for Substantial Assistance.

Section 5K1.1, Application Note 2 states in pertinent part

The sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility.

(emphasis added)

The significant language of Application Note 2 in this context is the use of the broad phrase "sentencing reduction." The term "sentencing reduction" is open enough to include reductions below a mandatory minimum as well as from a guideline range. In comparison, in the immediately subsequent section, §5K2.0, *Grounds for Departure* (Policy Statement), the Commission chose much more restrictive language in the commentary to describe the impact of a departure on the sentence.¹⁵ In §5K2.0, Commentary, the Commission twice described this departure as only "a departure from the guideline range."

¹⁵ Section 5K2.0(p.s.) implements the mandate of 18 U.S.C. §3553(b), which contains no authority for departure from a mandatory minimum statute.

In the context of this statutory framework, the combined choice of language in the Application Notes 1 and 2 was held to be significant by the Ninth Circuit panel in *Keene, supra*. The court remarked that "although 5K1.1 speaks initially in terms of 'departures' from the guidelines, section 994(n) and the Application Notes to 5K1.1 refer more generically to 'sentence reductions' and specifically refer to reductions below the statutory minimum as provided by 3553(e)." *Id.*, 933 F.2d at 714. In other words, by the overt reference to the greater statutory authority of §3553(e) in Application Note 1 and the use of 'sentencing reduction' in Application Note 2, the Commission reveals its understanding that §5K1.1 is the mechanism for implementing all substantial assistance departures.

The third Application Note to §5K1.1 also supports this interpretation. This note provides:

Substantial weight should be given to the government's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain.

Application Note 3 explicitly states that the court should give substantial weight to the government's evaluation of the defendant's cooperation. Implicitly, however, Application Note 3 is premised, and in fact only makes sense, based on the assumption that the court retains full discretionary power over the extent of the sentencing reduction.

If the Commission thought that the government retained the power to decide whether the court could

depart below a mandatory minimum, there would be little need for Application Note 3, as the government would already hold the key to the most significant aspect of a substantial assistance departure in most cases.¹⁶ Furthermore, one would also naturally expect that the application note(s) would refer to the government's power here to impose its will on the extent of departure by the type of motion it filed in the case. However, the application notes are silent, suggesting that the Commission intended no such radical interpretation of the statutory scheme. This interpretation of Application Note 3 was employed by the Seventh Circuit in affirming the power of the district court to sentence below a mandatory minimum upon a government motion solely under §5K1.1. In *United States v. Wills*, 35 F. 3d at 1196, Judge Ripple states that "[t]his application note, although making it clear that it is the duty of the court, not the prosecutor, to determine the extent of departure, also

¹⁶ The large majority of substantial assistance cases fall under mandatory minimum statutes, particularly narcotics cases. United States Sentencing Commission, 1994 Annual Report 86 (Table 74); United States Sentencing Commission, Special Report to Congress: Mandatory Minimum Penalties in the Federal Justice Systems 10 (1994). Because the Guidelines generally use the mandatory minimum as the floor for the guideline range, more often than not, the most significant benefit of cooperation is relief from the mandatory minimum, not from the guideline range. Furthermore, to allow the government, at its own discretion, to restrict substantial assistance departures to the guideline range would unnecessarily and unfairly restrict the relief that Congress created for cooperating defendants and usurp the role of the district courts to provide that relief. See *Ah-Kai*, *supra*, 951 F. 2d at 494.

makes it clear that the court ought to hear the government. . . . "

Taken as a whole, the text of §5K1.1 and each of its applications notes present a uniform picture of the Commission's intent in promulgating this policy statement – §5K1.1 was intended to be the sole means for implementing the statutory authority of a court and the Commission to reward defendants for providing substantial assistance in federal criminal cases, regardless of whether the crime fell under a mandatory minimum or only implicated a guideline sentence.

3. The Commentary to U.S.S.G. §2D1.1 Supports the Conclusion that the Commission intended §5K1.1 to Establish a Guideline Mechanism for Substantial Assistance Departures Below a Mandatory Minimum.

U.S.S.G. §2D1.1 is the primary offense guideline for drug trafficking cases under 18 U.S.C. §841. Section 841(b) contains various mandatory minimum penalties based on varying weights of eight types of controlled substances. The vast majority of federal cases that involve both mandatory minimum penalties and substantial assistance departures involve narcotics, and hence, involve application of §2D1.1.¹⁷

¹⁷ See United States Sentencing Commission, Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, 19(1991) (suggests that over 90% of mandatory minimum sentences might be attributable to three drugs covered by §841 and 18 U.S.C. §924(c) (which penalizes firearm use in crimes of violence and drug trafficking cases)).

In recognition of the confluence of mandatory minimums and departures in narcotic trafficking offense, the Commission promulgated Application Note 7 to §2D1.1, which states in pertinent part:

Where a mandatory (statutory) minimum sentence applies, this mandatory minimum sentence may be "waived", and a lower sentence imposed (including a sentence below the applicable guideline range), as provided in 28 U.S.C. §994(n), by reason of a defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense". See §5K1.1 (Substantial Assistance to Authorities).

Once again, the Commission's choice of language in an application note reveals its intent that §5K1.1 cover mandatory minimum penalties. Here, after the Commission states that a mandatory minimum may be waived, it cites to §5K1.1 without citing to 18 U.S.C. §3553(e). The only rational interpretation of this citation, since the Commission alone does not have the authority to waive a mandatory minimum, is that the Commission understands §5K1.1 to be the conduit through which §3553(e) is applied. See *Ah-Kai, supra*, 951 F.2d at 493 ("This Commentary supports the contention that the Sentencing Commission perceives §5K1.1 as covering departures both from 'mandatory (statutorily) minimum' sentences and from the guidelines."); *Beckett, supra*, 996 F.2d at 72; accord, *United States v. Rodriguez-Morales*, 958 F.2d 1441, 1448 (CA8 1992) (Heaney, J. dissenting).¹⁸

¹⁸ As noted above, the inclusion of Note 7 in §2D1.1 is rational because the vast majority of substantial assistance

In conclusion, there is strong evidence throughout the Guidelines Manual that the Commission sought to implement the mandate of Congress to create a unitary system for substantial assistance, and therefore, that it was intended that a government motion under §5K1.1(p.s.) be sufficient to invoke the court's power to depart below a mandatory minimum.¹⁹

departures from mandatory minimums occur in narcotics cases. Therefore, it is of no import that Note 7 is not repeated in §5K1.1. The Guidelines are replete with cross-references and these cross-references "are a central part of the guidelines scheme." *Rodriguez-Morales supra*, 958 F.2d at 1448 (Heaney, J. dissenting).

¹⁹ Given this clear interpretation by the Commission of the statutory intent, even if the Court finds some ambiguity to statutory framework, the Court should defer to the Commission's interpretation of the statute. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (because some agency interpretations of statutes amount to policy decisions, federal court must accept that reading of the statute under some circumstances); see also *United States v. Shabazz*, 933 F.2d 1029, 1035 (D.C. Cir.), (Thomas, J.) *cert. denied*, 502 U.S. 964 (1991) (invoking the *Chevron* doctrine in upholding sentencing guidelines challenged as inconsistent with a sentencing statute). Even if *Chevron* does not strictly compel the Court to accept any reasonable reading of the statute, the Court shall at least presumptively favor the Commission's interpretation of its statutory framework here, even if it is not strictly binding.

C. THE THIRD CIRCUIT'S ANALYSIS OF THE APPLICABLE STATUTES AND GUIDELINE COMMENTARY IS CONTRARY TO CONGRESSIONAL INTENT AND RENDERS PORTIONS OF THESE PROVISIONS SUPERFLUOUS.

The majority opinion of the panel in the Third Circuit below erred in its interpretation of both the statutory framework and the relevant guidelines and commentary in coming to its conclusion that a §5K1.1 motion does not trigger the court's departure authority under §3553(e) unless the statute is specifically cited and invoked. Furthermore, its analysis is contrary to congressional intent that substantial assistance cases be treated similarly and it renders terms with the applicable statutes and guidelines superfluous.

With regard to the applicable statutes, the panel argues that §3553(e) gives the prosecutor the "sole key" to substantial assistance departures and that nothing in §994 authorizes the Commission to take back that key in the Guidelines. *Melendez, supra*, 55 F. 3d at 134. This argument misreads the critical section of §3553(e) that requires that mandatory minimum departures for substantial assistance be "in accordance" with the guidelines. The Third Circuit sees these two sections as competing, or perhaps conflicting, when in actuality, the cross-references require they should be read together.

In its interpretation of the Commission's intent in promulgating §5K1.1, the Third Circuit panel in the instant case erred because it focused solely on one clause in the text of §5K1.1 which states that this policy statement applies to "departures from the guidelines". The

court reasoned that because §3553(e) states that it applies to substantial assistance departures from "mandatory minimums," this difference must represent "an advertent decision on the part of the Commission to provide authority in the Guidelines only for departures below the Guideline range, leaving departures below statutory minima to the authority conferred by §3553(e)." *Id.* at 135.

In a vacuum, the fact that §5K1.1 and §3553(e) differ in this respect might have significance. However, a review of the applicable statutes and guideline commentary reveals that an interpretation born of this myopic focus cannot be correct.

First, this analysis ignores the fact that §994(n) specifically directs the Commission to draft a provision that covers substantial assistance cases, including mandatory minimums. To accept this analysis, then, one must conclude that the Commission did not comply with its congressional mandate.²⁰ Given the alternate and reasonable interpretation that the Commission did intend §5K1.1 to cover mandatory minimum departures, the Court should choose the interpretation of agency action that is fully consistent with the enabling statute.

Second, the Third Circuit ignores the three application notes to §5K1.1, each of which suggests that the

²⁰ Indeed, in *Rodriguez-Morales, supra*, the Eighth Circuit case that *Melendez* purports to follow, the court there acknowledged that the Commission had the power but "In spite of section 994(n), the Commission has not provided for departures below the mandatory minimum sentence in the plain language of section 5K1.1." 958 F.2d at 1443.

Commission understood §5K1.1 to cover mandatory minimum cases. In particular, the majority opinion does not even attempt to deal with Application Note 1 which invokes the statutory authority of §3553(e) and §994(n).²¹ Similarly, the opinion fails to consider the other relevant guidelines commentary in Application Notes 2 and 3 to §5K1.1 and §2D1.1, Application Note 7.

Given the clear congressional intent that the Commission implement a unitary system for substantial assistance departures, it is an elevation of form over substance to conclude that the Commission implicitly intended in §5K1.1 to create a two-tier substantial assistance mechanism that requires different motions by a prosecutor or a motion with two citations of authority, to allow a court to depart from the guidelines or a statute based solely on the absence of the words "mandatory minimum" from the text of §5K1.1. This is particularly absurd when there are at least two reasonable explanations for why the

²¹ The contrary holding in the Eighth Circuit in *Rodriguez-Morales*, *supra*, at least attempted to explain this application note by suggesting that this note "is little more than an academic observation that, under the circumstances set forth in sections 994(n) and 3553(e), 'a sentence below the statutorily required minimum sentence' may be justified". 958 F.2d at 1443. The Eighth Circuit's suggestion that Application Note 1 is an "academic observation" is somewhat disingenuous. Commentary, particularly application notes, are intended by the Commission to be applied by courts in imposing sentence under the guidelines. See U.S.S.G. §2B1.7. Thus, to the extent that the Commission might make "academic observations" at all, it would include such comments in a "background commentary" section rather than an application note. Furthermore, both *Melendez* and *Rodriguez-Melendez* ignore the import of Application Notes 2 and 3 as discussed in Part II (B)(2), *supra*.

Commission chose to explain the relationship between §5K1.1 and mandatory statutes in the application notes.

First, in general, the text of the guidelines and policy statements are written to cover the "heartland" case. United States Sentencing Commission, *Guidelines Manual*, Chapter 1, Part 4(b). Background and application notes are then used to explain how to apply the guideline in the more unusual or atypical case or to determine if a departure is warranted. *E.g.*, U.S.S.G. §1B1.7; §2D1.1 Application Note 12 (estimating drug quantity when no drugs are seized); Note 17 (downward departure warranted when government agents manipulate drug quantity in a "reverse sting"). In this context, despite the absolute number of drug and gun indictments in the federal courts in recent years, the number of mandatory minimum statutes is still a fraction of the criminal penalty provisions in the U.S. Code. Therefore, in devising a Guideline system that primarily metes out guideline-derived sentences, it was reasonable for the Commission to refer to "the guidelines" in the text of §5K1.1 and to consider the unusual instance of a mandatory minimum substantial assistance departure in Application Note 1. In any event, by virtue of U.S.S.G. §5G1.1(b) and (c), mandatory minimum statutory provisions are incorporated into the guidelines. Thus, a departure below a mandatory minimum term is departure "from the guidelines" for many cases.²²

²² As Judge Heaney wrote, dissenting, in *Rodriguez-Morales*, 958 F.2d at 1148, "Many of the Guidelines are skeletal provisions for which commentary provides crucial supplementation." (quoting *U.S. v. Kelley*, 956 F.2d 748, 756 (CA8 1992) (en banc)).

Similarly, the Congressional directive to the Commission in §994(n) was anomalous. With the exception of substantial assistance departures, the Commission's original enabling legislation did not authorize downward departures from mandatory minimums. Therefore, one will not otherwise find in the text of the guidelines or policy statements any reason to refer to mandatory minimums. Thus, it is not surprising that the Commission maintained this division in the text of §5K1.1 and relegated to the application notes, an explanation of this unique situation.²³

Given the clear congressional intent, the Commission's explanation of its understanding of §5K1.1 in the application notes, and a reasonable explanation for the omission of the term "mandatory minimum" from the text of §5K1.1 there is no support for the Third Circuit's approach to this issue. Furthermore, as discussed in the next section, the interpretation of §5K1.1 advanced by petitioner is also consistent with the broader policy objective of the Sentencing Reform Act of 1984.

²³ To some extent, the Commission's choice of language may also reflect a reticence to test the outer limits of its powers. As the court noted in *Stinson, supra*, 113 S.Ct. at 191, in examining the weight to be given to guideline commentary, "It is perhaps ironic that the Commission's own commentary fails to recognize the full significance of interpretive and explanatory commentary."

D. DELEGATION OF THE DECISION TO DETERMINE THE IMPACT OF ANY SUBSTANTIAL ASSISTANCE ON THE SENTENCE TO THE COURT IS CONSISTENT WITH THE INTENT OF THE SENTENCING REFORM ACT OF 1984.

1. Allowing Prosecutors to Make Unreviewable Sentencing Decisions in Substantial Assistance Cases Will Increase Sentencing Disparity.

A critical goal of the Sentencing Reform Act of 1984 was to reduce sentencing disparities among similarly situated defendants. 28 U.S.C. §991. To accomplish this goal, Congress not only created the Commission and the Guidelines, it also imposed additional duties on the lower courts to promote and enforce uniformity and fairness. In addition to employing the guidelines and policy statements of the Commission in sentencing, a district court is also now required in most cases to give a statement of reasons for the particular sentence imposed, even when the sentence is within the guideline range. 18 U.S.C. §3553(b) & (c). Furthermore, district court sentences under the guidelines can be appealed by the defendant or the government, for *inter alia*, "an incorrect application of the guidelines" or if sentence represents a departure above or below the guideline range. 18 U.S.C. §3742(a)(2), (3) & (b)(2), (3).

These provisions promote uniformity and fairness because they bring the court's sentencing decisions into the public domain and subject such decisions to both appellate and public scrutiny. Other provisions, including §3553(e) and §994(n) should be interpreted consistent with these goals. Permitting the district court alone to

determine the extent of a substantial assistance departure, once the government indicates there has been substantial assistance, clearly promotes these goals. The court's reasoning becomes part of the record and is subject to judicial review. In addition, the Commission is provided with additional data which it is obligated to analyze and publish to Congress and the public to facilitate additional legislative reform. See 28 U.S.C. §995(12-16).

By contrast, an interpretation that allocates to the government power over the "substantial assistance" triggering mechanism and the critical decision to depart below a statutory minimum will frustrate these stated goals of the Sentencing Reform Act. First, in the absence of an unconstitutional motive, a prosecutor's decision not to file a substantial assistance motion, or a particular type of substantial assistance motion is unreviewable. *Wade, supra*. Furthermore, such decisions are routinely made internally, and there is no discovery mechanism to force the prosecutor to provide any reasons. This secretive, unreviewable system is much more likely to produce arbitrary results and increase sentencing disparities. Thus, promotion of the Sentencing Reform Act's salutary policies is another reason to reject the government's forced reading of the applicable statutes.

2. Explicit Legislative Language is Needed to Support a Significant Transfer of Sentencing Power from the Courts to the Prosecutor.

Traditionally, courts were entrusted with significant power to determine sentences. *Roberts v. United States*, 445 U.S. 552 (1980); *Williams v. New York*, 337 U.S. 241 (1949). Prosecutors were entrusted with the power to determine the charges. The Sentencing Reform Act made selective and explicit alterations to this existing system. As noted above, courts now must employ the Sentencing Guidelines in imposing sentence. However, courts still retain all other traditional sentencing powers within this framework. For example, a court may sentence a defendant outside the guideline range under appropriate circumstances, 18 U.S.C. §3553(b), without limitation as to the information that the court may consider. 18 U.S.C. §3661; 21 U.S.C. §850.

Furthermore, Congress knew how to adjust the relationship between the prosecutor and the court. Section 3553(e) explicitly grants the power to initiate a departure from the mandatory minimum to the prosecutor. However, nothing in §3553(e) suggests that any other traditional sentencing powers of the court have been transferred to the executive branch, including the extent of such a departure. As noted in *Keene, supra*, to accept the government's assertion that the government controls the extent of a substantial assistance departure by the type of motion it files, one would have to find that:

Congress intended to vest with the prosecutor not only the authority to make the motion, but also the authority to set the parameters of the

court's discretion. There is nothing in the legislative history, nor the language of §3553 that suggested such a result.

993 F.2d at 714.

Therefore, in the absence of specific language or other indicia of legislative intent, this Court should not presume that Congress intended to transfer any additional judicial power to the prosecutor.²⁴

²⁴ The view that prosecutors should retain control over the extent of a substantial assistance departure is rooted in the government's implicit mistrust of any judicial discretion in cases involving mandatory minimum statutes. This view has no statutory basis and is unwarranted as a policy matter. As the majority of lower courts have noted, while a prosecutor is "in the best position to know whether defendant's cooperation has been helpful . . . [t]he extent of that assistance and its impact on the sentence are matters left within the sound discretion of the sentencing judge." *Keene, supra*, 933 F.2d at 714; *Ah-Kai, supra*, 951 F.2d at 494 (quoting *Keene*). While it is true that as a statutory exception, the various mandatory minimum penalties are generally immune to judicial sentencing discretion, §3553(e) explicitly erases this distinction. Therefore, there are no statutory or policy reasons to deny courts their normal function in setting an appropriate sentence. At its heart, the contrary position is most likely based on an unstated assumption that because many federal judges have expressed dissatisfaction with mandatory minimums, some will use substantial assistance cases to subvert mandatory minimum penalties. See *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, supra*, at 93-96. Neither this argument nor its underlying assumptions have any legitimacy.

E. IF ANY DOUBT REMAINS AS TO THE PROPER CONSTRUCTION OF 18 U.S.C. §3553(e), 28 U.S. §994(n) AND U.S.S.G. §5K1.1, THAT DOUBT MUST BE RESOLVED IN FAVOR OF LENITY.

As a last resort, if the court is not sure of the proper construction of the statutory sentencing scheme involved in this case, that doubt must be resolved in favor of lenity. *Bifulco v. United States*, 447 U.S. 381 (1980); *Busic v. United States*, 446 U.S. 398, 406-07 (1980). In the present context, the rule of lenity requires that mandatory minimum sentencing statutes be given a strict and narrow construction. In this way, judicial discretion will be preserved, to the extent possible, to select a sentence which in each case is "sufficient, but not greater than necessary" to achieve the purposes of sentencing established by law. 18 U.S.C. §3553(b).

CONCLUSION

Based upon the foregoing, petitioner prays that the Court of Appeals' ruling be reversed, sentence vacated, and this matter remanded to the district court for resentencing.

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18 U.S.C. 3553(e)

* * *

(e) **Limited authority to impose a sentence below a statutory minimum.** – Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

* * *

28 U.S.C. 994(n)

* * *

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

* * *

United States Sentencing Guidelines, Section 5K1.1

PART K – DEPARTURES

1. SUBSTANTIAL ASSISTANCE TO AUTHORITIES

§5K1.1. Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

- (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
- (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
- (3) the nature and extent of the defendant's assistance;
- (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
- (5) the timeliness of the defendant's assistance.

CommentaryApplication Notes:

1. Under circumstances set forth in 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), as amended, substantial assistance in the investigation or prosecution of another person who has committed an offense may justify a sentence below a statutorily required minimum sentence.
2. The sentencing reduction for assistance to authorities shall be considered independently of any reduction for acceptance of responsibility. Substantial assistance is directed to the investigation and prosecution of criminal activities by persons other than the defendant, while acceptance of responsibility is directed to the defendant's affirmative recognition of responsibility for his own conduct.
3. Substantial weight should be given to the government's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain.

Background: A defendant's assistance to authorities in the investigation of criminal activities has been recognized in practice and by statute as a mitigating sentencing factor. The nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis. Latitude is, therefore, afforded the sentencing judge to reduce a sentence based upon variable relevant factors, including those listed above. The sentencing judge must, however, state the reasons for reducing a sentence under this section. 18 U.S.C. § 3553(c). The court may elect to provide its reasons to the defendant in camera and in writing under seal for the safety of the defendant or to avoid disclosure of an ongoing investigation.

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Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (*see* Appendix C, amendment 290).

§5K1.2. Refusal to Assist (Policy Statement)

A defendant's refusal to assist authorities in the investigation of other persons may not be considered as an aggravating sentencing factor.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (*see* Appendix C, amendment 291).

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21 U.S.C. 841(b)(1)(A)

* * *

Penalties

(b) Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving -

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of -

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(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

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(viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or \$4,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or \$8,000,000 if the defendant is an individual or \$20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of

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imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

* * *
